

No. 91644-6

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

[No. 7172-9-I – Court of Appeals, Division I]

FRED BINSCHUS, individually and as Personal Representative of the Estate of JULIE ANN BINSCHUS; TONYA FENTON; TRISHA WOODS; TAMMY MORRIS; JOANN GILLUM, as Personal Representative of the Estate of GREGORY N. GILLUM; CARLA J. LANGE, Individually and as Personal Representative of the Estate of LEROY B. LANGE; NICHOLAS LEE LANGE, Individually; ANDREA ROSE, Individually and as Personal Representative of the Estate of CHESTER M. ROSE; STACY ROSE, Individually; RICHARD TRESTON and CAROL TRESTON; and the marital community thereof; BEN MERCADO; and PAMELA RADCLIFFE, Individually and as Personal Representative of the ESTATE OF DAVID RADCLIFFE; TROY GIDDINGS, Individually,

Respondents,

v.

SKAGIT COUNTY, a political subdivision of the State of Washington,

Petitioner,

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS;
SKAGIT EMERGENCY COMMUNICATIONS CENTER d/b/a "Skagit 911," an interlocal government agency; OKANOGAN COUNTY, a political subdivision of the State of Washington,

Defendants.

MEMORANDUM OF AMICUS WASHINGTON CITIES INSURANCE
AUTHORITY IN SUPPORT OF PETITIONER SKAGIT COUNTY

Attorneys for Amicus, Washington Cities Insurance Authority,

FILED AS
ATTACHMENT TO EMAIL

 ORIGINAL

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TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF AMICUS CURIAE 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 2

A. Legal Causation Is Grounded In Policy
Determinations As To How Far The
Consequences Of a Defendant’s Acts Should
Extend – And In This Case – The Court Of
Appeals Has Extended Those Consequences Too
Far. 2

1. Jailors Are Responsible For The Safety
Of Inmates And Staff Inside The Jail –
Not People Outside The Jail. 3

2. It Is Illogical To Make Jailors
Responsible For The Conduct Of
Offenders After They Are Released
From Jail As Jailors Have No Legal
Authority To Dictate Or Control That
Conduct..... 7

3. The Large Gap In Time Between
Zamora’s Release From Jail And His
Later Crimes Defeats The Possibility Of
Legal Causation In This Case..... 8

4. Inmates Cannot Be Forced To Take
Antipsychotic Medication Unless It Is
Necessary To Ensure The Safety Of The
Inmate, Other Prisoners, Or Prison Staff. 9

IV. CONCLUSION 11

TABLE OF AUTHORITIES

Cases

<i>Binschus v. State, Dept. of Corrections</i> , 186 Wn. App. 77, 86-87, 345 P.3d 818 (2015).....	1, 6
<i>Bishop v. Miche</i> , 137 Wn.2d 518, 531, 973 P.2d 465 (1999).....	6
<i>Gmerek v. Rachlin</i> , 390 So.2d 1230, 1231 (Fla. App. 1980).....	11
<i>Gregoire v. City of Oak Harbor</i> , 170 Wash. 2d 628, 635-36, 244 P.3d 924 (2010).....	4
<i>Harbeson v. Parke-Davis, Inc.</i> , 98 Wash.2d 460, 475, 656 P.2d 483 (1983).....	2
<i>Hartley v. State</i> , 103 Wn.2d 768, 777-81, 698 P.2d 77 (1985).....	2, 3, 4
<i>Hertog, ex rel. S.A.H. v. City of Seattle</i> , 138 Wn.2d 265, 281, 979 P.2d 400 (1999).....	7, 8
<i>Hertog, ex rel. S.A.H. v. City of Seattle, supra</i>	7
<i>Joyce v. State, Dep't of Corrections</i> , 155 Wn.2d 306, 119 P.3d 825 (2005).....	7, 8
<i>Kim v. Budget Rent A Car Sys., Inc.</i> , 143 Wn. 2d 190, 204-06, 15 P.3d 1283 (2001).....	10
<i>King v. Seattle</i> , 84 Wash.2d 239, 249, 525 P.2d 228 (1974)	2, 3, 4
<i>Kusah v. McCorkle</i> , 100 Wash. 318, 325, 170 P. 1023 (1918).....	5
<i>MacDonald v. PKT, Inc.</i> , 464 Mich. 322, 335, 628 N.W.2d 33 (2001).....	9
<i>McKown v. Simon Property Group, Inc.</i> , 182 Wn.2d 752, 344 P.3d 661 (2015).....	9, 10
<i>Petersen v. State</i> , 100 Wash.2d 421, 435, 671 P.2d 230 (1983).....	2, 7, 8
<i>Shea v. City of Spokane</i> , 17 Wash.App. 236, 242, 562 P.2d 264 (1977), <i>aff'd</i> , 90 Wash.2d 43, 578 P.2d 42 (1978).....	5
<i>Taggart v. State</i> , 118 Wn.2d 195, 223-24, 822 P.2d 243 (1992).....	6, 7, 8
<i>Washington v. Harper</i> , 494 U.S. 210, 221-22 (1990).....	12

Treatises

1 T. Street, <i>Foundations of Legal Liability</i> 100, 110 (1906).....	2
---	---

McLaughlin, Proximate Cause, 39 Harv.L.Rev. 149, 155 (1925).....	3
Restatement (Second) of Torts § 319.....	4
W. Prosser, <i>Torts</i> 237, 244 (4th ed. 1971).....	2, 3

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Washington Cities Insurance Authority (“WCIA”), is a municipal organization of Washington public entities that join together for the purpose of providing protection, education, training and risk management to its members, which include cities, towns and public safety answering points for emergency services. It has an interest in this case because if the Court of Appeals decision is allowed to stand, its members will be significantly affected by the expansion of tort liability in the area of providing jail services.

II. STATEMENT OF THE CASE

WCIA adopts the facts set forth by Petitioner Skagit County in its Petition for Review and supplemental brief. WCIA further notes that the facts recognized by the Court of Appeals include the fact that Mr. Zamora did not have any behavioral issues while he was in jail, and he did not present a risk to himself or others while in jail.¹ The facts also indicate Mr. Zamora would not take the mood stabilizing medication he was prescribed in jail.² Mr. Zamora was released from Okanogan County Jail on August 2, 2008, and did not commit the crimes at issue in this case until September 2, 2008.³

¹ *Binschus v. State, Dept. of Corrections*, 186 Wn. App. 77, 86-87, 345 P.3d 818 (2015).

² *Id.*, at 87.

³ *Id.*, at 87-89.

III. ARGUMENT

A. Legal Causation Is Grounded In Policy Determinations As To How Far The Consequences Of a Defendant's Acts Should Extend – And In This Case – The Court Of Appeals Has Extended Those Consequences Too Far.

Washington law recognizes two elements to proximate cause: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777-81, 698 P.2d 77 (1985), citing *Harbeson v. Parke-Davis, Inc.*, 98 Wash.2d 460, 475, 656 P.2d 483 (1983); *Petersen v. State*, 100 Wash.2d 421, 435, 671 P.2d 230 (1983); *King v. Seattle*, 84 Wash.2d 239, 249, 525 P.2d 228 (1974). Cause in fact refers to the “but for” consequences of an act—the physical connection between an act and an injury. *King v. Seattle, supra* at 249.

Legal causation, on the other hand, rests on policy considerations as to how far the consequences of defendant's acts *should* extend. *Hartley v. State, supra* at 779. It involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact. *Id.* If the factual elements of the tort are proved, determination of legal liability will be dependent on “mixed considerations of logic, common sense, justice, policy, and precedent.” *Id.*, citing *King v. Seattle*, 84 Wash.2d at 250 (quoting 1 T. Street, *Foundations of Legal Liability* 100, 110 (1906)). *See also* W. Prosser, *Torts* 237, 244 (4th ed. 1971).

As the court explained in *Hartley v. State*, duty and legal causation are intertwined and linked to policy considerations. *Id.*, at 779-80. The

Supreme Court quoted Prosser in noting that it is often helpful to state every question which arises in connection with legal causation in the form of a single question: Was the defendant under a duty to protect the plaintiff against the event which did in fact occur? In this case, the question is: Was the jail under a duty to protect the Respondents from being attacked by an inmate a month after he was released from the jail?

Such a question serves to direct attention to the policy issues which determine the extent of the original obligation and of its continuance, rather than to the mechanical sequence of events which goes to make up causation in fact. “The entire doctrine [of proximate cause] assumes that a defendant is not necessarily to be held responsible for all the consequences of his acts.” *King*, at 250, citing *McLaughlin*, *Proximate Cause*, 39 Harv.L.Rev. 149, 155 (1925). As Prosser put it – does the defendant stand in any relation to the plaintiff as to create any legally recognized obligation of conduct for the plaintiff’s benefit? *Hartley*, at 780, citing *Prosser* at 244-45. The answer to that question in this case is “no.”

1. Jailors Are Responsible For The Safety Of Inmates And Staff Inside The Jail – Not People Outside The Jail.

Washington courts have long recognized a jailor's special relationship with inmates, particularly the duty to ensure health, welfare, and safety. *Gregoire v. City of Oak Harbor*, 170 Wash. 2d 628, 635-36,

244 P.3d 924 (2010). In *Kusah v. McCorkle*, 100 Wash. 318, 325, 170 P. 1023 (1918), the Supreme Court acknowledged that a sheriff running a county jail owes the direct duty to a prisoner in his custody to keep him in health and free from harm. The duty owed “is a positive duty arising out of the special relationship that results when a custodian has complete control over a prisoner deprived of liberty.” *Gregoire v. City of Oak Harbor*, at 635, citing *Shea v. City of Spokane*, 17 Wash.App. 236, 242, 562 P.2d 264 (1977), *aff’d*, 90 Wash.2d 43, 578 P.2d 42 (1978).

“[A] city, in operating and maintaining a jail, has a twofold duty: one to the public to ‘keep and produce the prisoner when required,’ and the other to the prisoner ‘to keep him in health and safety.’” *Shea v. City of Spokane*, 17 Wn. App. at 241-42, citing *Kusah v. McCorkle*, 100 Wash. at 323. No Washington case has ever broadened this to a duty to protect the public from new criminal acts committed by the prisoner after he is released from the jail.

Restatement (Second) of Torts § 319 states:

One who “takes charge” of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

(Quotes added). In its opinion in this case, the Court of Appeals noted the Washington courts have broadened the scope of the “take charge”

relationship to exist between correction officers and offenders.⁴ The court cites to three cases to illustrate this point.⁵ *However these three cases all involved government employees who were specifically tasked with the job of monitoring the conduct of offenders after they were released into the community.* The court was unable to cite to a single case that has broadened the scope of the “take charge” relationship to exist between jailors and offenders once the offender leaves the jail, because there is no such precedent. Indeed, it would not be logical to do so as corrections officers take over the supervision of these offenders once they leave the jail.

Similarly, Respondents were unable to locate any precedent where a court has found legal causation against a jailor for criminal acts committed after an inmate was released from jail – let alone acts committed more than 30 days after release. Respondents predictably cite to *Peterson, Taggart, Hertog, and Joyce* in their brief.⁶ However, none of these cases involved the relationship between a jailor and a former jail inmate. Further, although Respondents baldly assert there is no difference between the legal causation

⁴ *Binschus v. State, Dept. of Corrections*, 186 Wn. App. at 93.

⁵ *Taggart v. State*, 118 Wn.2d 195, 223-24, 822 P.2d 243 (1992) (parolee assaulted victims after release from jail); *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 281, 979 P.2d 400 (1999) (probationer on pretrial release assaulted young girl); *Bishop v. Miche*, 137 Wn.2d 518, 531, 973 P.2d 465 (1999) (probationer killed child in drunk driving accident).

⁶ *Peterson v. State, supra*; *Taggart v. State, supra*; *Hertog, ex rel. S.A.H. v. City of Seattle, supra*; and *Joyce v. State, Dep't of Corrections*, 155 Wn.2d 306, 119 P.3d 825 (2005).

arguments in those prior cases and the one at issue here; in truth, there is a key difference. In those cases, there was an ongoing relationship with the criminal, either as someone providing counseling services or monitoring behavior. In this case, there was no longer any relationship or contact with the jail. It is an over simplification to argue that the analysis of legal causation in this case would be the same.

In *Peterson*, the court only analyzed the cause in fact issue, not legal causation.⁷ The court ruled the facts were disputed and the inferences to be drawn from them may vary; therefore, there was enough evidence to submit the issue of *factual causation* to the jury.

Both *Taggart* and *Hertog* involved an ongoing parole and/or probation supervision relationship. In fact, this Court specifically noted,

Policy considerations involved in imposing the duty, such as the parole officer's taking charge of the parolee with the ability and responsibility to supervise the parolee, and the knowledge of the one taking charge of dangerous propensities posing a harm to others, also suggest that where such a [parole officer and parolee] relationship is not found, proximate causation may not be so readily found either.

Hertog, 138 Wn.2d at 284 (emphasis added).

Finally, in *Joyce*, the legal causation argument was not the same as the argument here.⁸ There, the State argued there was no legal causation

⁷ *Peterson v. State*, 100 Wn.2d at 436.

⁸ *Joyce v. State, Dep't of Corrections*, at 155 Wn.2d at 321.

because it was unknown what a judge would have done with a probationer who violated his probation, thus legal causation should not extend beyond the notice of a violation. The issue in this case is entirely different. It is whether legal causation against a jailor should extend for a month *after* a probationer is released from jail.

2. It Is Illogical To Make Jailors Responsible For The Conduct Of Offenders After They Are Released From Jail As Jailors Have No Legal Authority To Dictate Or Control That Conduct.

In the recent decision of *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 344 P.3d 661 (2015), the Supreme Court rejected a broad notice rule requiring landowners to protect business invitees from third party criminal misconduct merely because it is foreseeable that crimes may be committed on their property.

Subjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten. Because criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere. However, even police, who are specially trained and equipped to anticipate and deal with crime, are unfortunately unable universally to prevent it. This is a testament to the arbitrary nature of crime. Given these realities, **it is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity but are also without a community deputation to do so**, effectively vicariously liable for the criminal acts of third parties.

McKown, at 669 (emphasis added), citing *MacDonald v. PKT, Inc.*, 464 Mich. 322, 335, 628 N.W.2d 33 (2001). The Court was analyzing the issue

of duty in *McKown*, not legal causation, but the policy implications are relevant to the *Binschus* case as well.

Just as landowners are not deputized to engage in law enforcement and crime prevention in the community, neither are jailors. They have no authority to act once an inmate is released from confinement. They certainly have no authority to ensure compliance with mental health treatment or medications once inmates are no longer under their control. The *McKown* court found it was unjustified to hold landowners liable for the criminal acts of third parties when they are not deputized to prevent crime. The Court of Appeals completely ignored this question of policy in its decision below. However, this Court should reject a policy of holding jailors liable for the criminal acts of former inmates who they are no longer deputized to control or contain. Particularly when a large amount of time has passed since their confinement.

3. The Large Gap In Time Between Zamora's Release From Jail And His Later Crimes Defeats The Possibility Of Legal Causation In This Case.

In *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn. 2d 190, 204-06, 15 P.3d 1283 (2001), *as amended* (Jan. 31, 2001), a car rental agency left keys in one of its rental vehicles and an offender stole the vehicle. The next day, the offender consumed alcohol and marijuana, caused an accident, attempted to flee from police, and caused a second accident that severely

injured the plaintiff. The court held the remoteness in time between the criminal act and injury (only one day) was dispositive to the question of legal cause. In so doing, the court stated, “Even if it were negligent for Budget to leave the keys inside of its minivan, ‘the responsibility for such negligence must terminate at some time in the future...’” *Id.*, at 205, citing *Gmerek v. Rachlin*, 390 So.2d 1230, 1231 (Fla. App. 1980). The court found it significant that the offender went home, went to sleep, and became intoxicated before causing the accident that injured the plaintiff.

The same policy concern applies in this case – times 30. Mr. Zamora was released from the Okanogan County Jail on August 2, 2008. He did not commit the crimes at issue until 30 days later on September 2, 2008. Common sense and justice dictate that a jail cannot be answerable in perpetuity for the criminal conduct of its former inmates. Particularly since the jail has no control over its former inmates once they leave the cell block.

4. Inmates Cannot Be Forced To Take Antipsychotic Medication Unless It Is Necessary To Ensure The Safety Of The Inmate, Other Prisoners, Or Prison Staff.

Inmates possess a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment. *Washington v. Harper*, 494 U.S. 210, 221-22 (1990). In *Washington v. Harper*, the U.S. Supreme Court

stated that where an inmate's mental disability is the root cause of the threat he poses **to the inmate population**, the state's interest in decreasing the danger to others necessarily encompasses an interest in providing him with medical treatment for his illness. *Id.*, at 225-26. "We hold that, **given the requirements of the prison environment**, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Id.*, at 227 (emphasis added). The Court made no mention of a jail having any authority to force medical treatment or antipsychotic drugs on inmates to protect the general public once they are released from jail. This is likely because this would be an infringement on the inmates' constitutional rights. It could also send treatment of mentally ill offenders in jail back to the dark ages with forced medications and treatments against their will merely because they have a mental illness, regardless of whether they have actually demonstrated any behavioral problems or violent tendencies.

Here, the facts cited by the Court of Appeals indicate Mr. Zamora did not have any behavioral issues while in jail, and he did not present a risk to himself or others while in jail. He also refused to take the mood stabilizing medication he was prescribed. Yet, despite acknowledging these facts, the Court of Appeals ruled a jury could still decide the jail was

negligent for failing to evaluate, treat and administer antipsychotic drugs to Mr. Zamora while he was at the jail. This conflicts with well-established precedent and constitutional law. Without the required threat to the jail environment, a jailor cannot force medical treatment or antipsychotic drugs on inmates against their will, and certainly not as a means to try and protect future possible crime victims in the general public after the inmate is released.

IV. CONCLUSION

Respondents suggest in their supplemental brief that the issue of legal causation is not important because Petitioner Skagit County did not spend pages and pages of its brief addressing it. WCIA is confident that this Court is more impressed by simplicity and clarity than verbosity.

For the policy reasons set forth above which establish a lack of legal causation in this case, and for the reasons provided by Petitioner Skagit County, WCIA respectfully requests that the Court reverse the Court of Appeals decision in this case.

Respectfully submitted this 4th day of December, 2015.

KEATING, BUCKLIN & MCCORMACK,
INC., P.S.

By: /s/ Shannon M. Ragonesi
Shannon M. Ragonesi, WSBA #31951

CERTIFICATE OF SERVICE

I declare that on December 4, 2015, a true and correct copy of the foregoing document was sent to the following parties of record via electronic mail:

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DATED this 4th day of December, 2015.

/s/ Elena Ortiz

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Sir,

Attached is an electronic copy of the Amicus Brief on behalf of the Washington Cities Insurance Authority. Counsel of record as well as other Amicus Curiae are copied hereto in accordance with prior arrangement. Should you have any questions or concerns please feel free to contact Shannon M. Ragonesi directly. If you are unable to view the attachments please contact the undersigned immediately. Thank you in advance for your professional courtesies.

On behalf of Ms. Ragonesi,

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